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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1171

ATLANTIC REALTY COMPANY, PETITIONER

v.

BILLY ALLEN, et al., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this action on October 23, 1967, rehearing denied November 30, 1967.[1]

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[1] In addition to the respondent named in the caption, the following individuals are also respondents: Georgia Allen, Bernice Barnes, Lottie Belle Carter, Dorothy Chester, Emma Lee Curry, Willie Fred Davis, Love Eley, Lillie Gregory, James Riley Hodo, Thomas Lee Hollenhead, Willie A. Knight, Susie Lawrence, Mollie Merriweather, Johnnie Mae Miller, Willa Mae Oliver, Joe Parham, Henry L. Porter, Julius Pounds, John Reid, Priscilla Reid, Linton Roberts, Joseph Sorrells, Uvora Sorrells, John Willie Sullivan, Jr., Herman Tigner, Billy Ray Trice, Alex Webb, Edna Whigham and Lula Woodall.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia (R. 68-74)[2] is unreported and is attached as Appendix A hereto. The opinion of the Court of Appeals for the Fifth Circuit, reversing the decision of the District Court, is reported in 384 F.2d 527 (5th Cir. 1967) and is attached as Appendix B. The judgment of the Court below is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 23, 1967. A timely filed Motion for Rehearing was denied on November 30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, notwithstanding the decision of this Court in *10 East 40th St. Bldg., Inc.* v. *Callus*, 325 U.S. 578 (1945), the minimum wage provisions of the Fair Labor Standards Act extend to the custodial employees of the owner of a general office building merely because approximately 75% of the rentable space in such building is leased to non-manufacturing interstate corporations for use as executive offices.

STATUTE INVOLVED

The statutory provisions involved are Sections 6(a) and 3(j) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. §§ 206(a), 203(j):

Section 6(a)

"Every employer shall pay to each of his employees who in any workweek is engaged in commerce or

[2] References to "R." are to the certified record; references to "App." are to the appendices to this petition.

in the production of goods for commerce, wages at the following rates:"

Section 3(j)

". . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any closely related process or occupation directly essential to the production thereof, in any State."

STATEMENT

Petitioner, Atlantic Realty Company, is a Georgia corporation which owns and operates a general office building known as the Hurt Building in Atlanta, Georgia. (R. 2). Petitioner leases space in its building to 32 separate tenants (R. 34, 290), and provides those tenants with the customary office building services. (R. 3, 10).

Approximately 75% of the rentable space in the Hurt Building was leased by Southern Bell Telephone and Telegraph Company and its parent company, A. T. & T., during the two-year period in controversy. Another 7.5% was leased by the Travelers Insurance Company, and the remaining space leased by miscellaneous tenants. (R. 290).

Respondents are employed by petitioner to perform janitorial services in the Hurt Building. They commenced this action in the District Court for the Northern District of Georgia under Section 16(b) of the Fair Labor Standards Act, seeking unpaid minimum wages for the period June 1, 1963, to May 31, 1965, and liquidated damages of an equal amount. (R. 1-7).

The only issue in the district court was whether Section 6 of the Fair Labor Standards Act was applicable to respondents by reason of their being either "in commerce" or "engaged in the production of goods for commerce." At the close of the respondents' case, the district judge found that none of them was "engaged in commerce" or

"performed any service related to production of goods for commerce." (R. 72; App. A 3-4). Accordingly, he concluded that they had not made out their case as alleged, and entered judgment for petitioner. (R. 71; App. A 5).

The court of appeals concluded, contrary to the district court, that the building's principal tenant was "engaged in the production of goods for commerce." On that basis, the court concluded that the respondents were covered by the Act and reversed the district court's judgment. However, the court did not upset either of the express findings of fact concerning the custodial employees made by the district court, nor did it substitute any finding either of law or of fact concerning their relation, if any, to the production of goods for commerce. (R. 292-98; App. B).

REASONS FOR GRANTING THE WRIT

The scope of the minimum wage provisions of the Fair Labor Standards Act of 1938, as amended, has been before this Court time and again. As the Court has noted, Congress in this instance did not choose to exercise its full power under the Constitution to regulate commerce. *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, 315 (1960). Moreover, it left to the courts rather than any agency the task of drawing the line between those employees engaged "in commerce" or the "production of goods for commerce," and those which Congress considered to be engaged in essentially "local activities." *Id.* at 318.

The question of the Act's application to building maintenance and custodial employees has been among the most vexing to require this Court's attention. But from the decisions of this Court there has emerged a set of guidelines which have enabled the federal courts to apply the Act to such employees in a uniform and rational manner. These decisions, principally *10 East 40th St. Bldg. Inc.* v. *Callus*, 325 U.S. 578 (1945), allowed both employers and

employees to determine the Act's coverage with reasonable certainty.

The decision below departs sharply from these settled judicial propositions. Moreover, it conflicts directly with decisions of the Fourth and Sixth Circuits which have correctly interpreted *Callus*. If allowed to stand uncorrected, it will destroy the certainty which has been developed with regard to maintenance and custodial employees, will foster litigation requiring case-by-case determination of the activities of each tenant in an office building, and will result in inconsistent application of the Act.

I. The Decision Below Is In Direct Conflict With the Decisions of This Court Which Settled the Act's Coverage of Building Maintenance and Custodial Employees.

Section 6 of the Fair Labor Standards Act extends federal minimum wage coverage to every employee "engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 206(a). An employee "shall be deemed to have been engaged in the production of goods" if he was employed "in any closely related process or occupation directly essential to the production thereof . . . ." 29 U.S.C. § 203(j).

Maintenance and custodial employees, by the nature of their tasks, are rarely if ever themselves engaged "in commerce." Nor do their activities normally constitute "production of goods for commerce." Therefore, the principal question that has confronted the courts with regard to such employees—janitors, elevator operators, engineers, cleaners, and the like [3]—is whether their services constitute "a closely related . . . occupation directly essential to the production of goods for commerce."

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[3] Although respondents offered no proof whatsoever as to the nature of their activities, the district court correctly found that they all were janitors. (R. 70; App. A 2).

In three cases decided prior to the 1949 amendments to the Act,[4] this Court laid down guidelines that have withstood the test of time.

In *Kirschbaum* v. *Walling*, 316 U.S. 517 (1942), the question presented was whether the Act applied to the maintenance employees of two buildings. One was a loft building whose principal tenants manufactured men's and boys' clothing on the premises. The other was a building in New York's garment district, most of whose tenants were engaged either in manufacturing or buying and selling ladies' clothing. In holding that the maintenance employees were covered by the Act, this Court determined that, in the buildings in question, dedicated as they were to the manufacture of goods, the maintenance employees "had such a close and immediate tie with the process of production," *id.* at 525, that their work was inescapably "necessary" to such production.[5]

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[4] The 1949 amendments to the Act revised the last clause of Section 3(j). Prior to the amendment, any employee was within the Act's coverage if he was employed "in any process or occupation *necessary* to the production" of goods. 52 Stat. 1061. (Emphasis added.) This clause was amended in 1949 by providing more narrowly that the employee must have been employed "in any *closely related* process or occupation *directly essential* to the production" of goods. 63 Stat. 911. (Emphasis added.) As this Court noted in *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. at 316-18, this change evidenced Congressional disapproval of certain court decisions that had included employee activities too remote from or incidental to commerce to be included within the coverage of the Act.

The court below apparently misconstrued the significance of the restrictive language added by Congress to Section 3(j) in 1949. Petitioner does not claim, nor did it claim below, that the lines drawn by this Court in its various building maintenance employee decisions were in any way overruled by Congressional action. However, Congress' renewed instruction to the federal courts "to avoid intrusion in withdrawn local activities" in applying the Act (*Id.*, at 318) is in basic conflict with the decision below, which expands the Act's coverage well beyond the area delineated by this Court.

[5] This Court found it irrelevant that the building owners were not themselves producing goods for commerce. 316 U.S. at 524.

The second major case is *Borden Co.* v. *Borella*, 325 U.S. 679 (1945). There, a manufacturing corporation owned an office building in New York City and used most of the building for its own executive offices. This Court found that the executive functions were part of Borden's "coordinated productive pattern of modern industrial organizations." 325 U.S. at 683. Since the "operation and maintenance of a central office building is essential to the economy, efficiency and continuity of production," *id.* at 684, this Court concluded that Borden's employees hired to maintain the building were covered by the Act.

The third principal case—and the one which the court below misapplied—is *10 East 40th St. Bldg., Inc.* v. *Callus*, 325 U.S. 578 (1945). At issue in that case was the coverage of the maintenance employees of a locally owned office building which leased offices to a variety of tenants. The lower court had determined that 48% of the rented area of the building was occupied by tenants who, like those inhabiting the Borden building,[6] were engaged in non-manufacturing activities which nonetheless constituted the production of goods for commerce. It had held, therefore, that the building maintenance employees were covered by the Act. 146 F.2d 438 (2d Cir. 1944).

This Court reversed. While noting that the function of the maintenance personnel was essentially similar to that involved in the other cases,[7] this Court reasoned that (325 U.S. at 583):

> "To assign the maintenance men of such an office building to the productive process because some pro-

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[6] See *Bozant* v. *Bank of New York*, 156 F. 2d 787, 789 (2d Cir. 1946).

[7] There is no question that this Court in *Callus* held against the maintenance employees despite its acknowledgment that "production of goods" (in the statutory sense) was being performed by tenants on the premises (325 U.S. at 581): "[T]he executive offices of manufacturing and mining concerns, sales agencies representing such concerns, and publicity concerns *were engaged in the production of goods* . . . ." (Emphasis added.)

> portion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them."

It concluded (325 U.S. at 583-84):

> "But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts."

Finally, as recently as eight years ago, in *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310 (1960), this Court reviewed its prior cases and reaffirmed the fundamental distinction which it had recognized between the *Kirschbaum* and *Borden* situations on the one hand, and the *Callus* situation on the other.

The decisive factor in each of these cases was the purpose for which the building in question was maintained or operated. If, on the one hand, a building such as a loft building or clothing factory is constructed for and dedicated to the purpose of housing tenants who inevitably will be involved in the physical production of goods, the fact that the building employees work for the landlord and not for the tenant should not prevent them from receiving the benefits that Congress intended to confer upon those closely related to the production of goods for commerce. The same rationale holds true in the *Borden* situation. To differentiate between employees who maintain the building where products are manufactured and employees of the same employer who maintain a separate building housing the same employer's executive offices "is to make too much turn on the accident of the division of the whole industrial process." *10 East 40th St. Bldg., Inc.* v. *Callus*, 325 U.S. at 581.

On the other hand, a locally owned office building which holds its space out for general tenancy is an entirely different matter, as this Court recognized in *Callus*. There may or may not be tenants who "produce goods for commerce" at any particular time. The percentage of those who so "produce" may vary from year to year. But the locally owned general office building is not constructed or maintained for the purpose of housing producers of goods for commerce. Thus, it is reasonable to conclude that the maintenance employees of such a building are less "closely related" to the production of goods for commerce. Moreover, it would be wholly irrational to place the maintenance employees of one office building owner within the Act's coverage and exempt the employees of his neighbor because of the particular tenants who occupied the office space during a particular time.

This distinction,[8] involving the determination whether a building is " 'dedicated' to the production of goods for commerce,"[9] not only makes good sense but applies logi-

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[8] As noted in 55 Yale L.J. 421, 422-24 (1946):

> "The Supreme Court has evolved two rules in the application of this statute to maintenance workers. It was first held that where processing or manufacturing by either owners or tenants takes place upon the premises, maintenance workers have a sufficiently close relation to production to be covered by the Act. [citing *Kirschbaum*]. Later, a correlative doctrine developed that if goods are not physically handled in the building, such maintenance employees will be protected if their employer is engaged in interstate business, but not when *tenants* are taking part in interstate activity and the employer operates the building. [citing *Borden* and *Callus*.]
>
> * * * *
>
> "While manufacturing by either owners or tenants would extend the Act to maintenance workers under the *Kirschbaum* case, the *Callus* and *Borden* holdings seem to mean that where the activity in the building is something removed from physical processing of goods, such as managing or advertising, the maintenance workers will only be protected if such interstate activity is done by their direct employer."

[9] *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F.2d 451, 460 (4th Cir. 1963), *cert. denied*, 377 U.S. 925 (1964).

cally to new fact situations. For instance, in *Public Building Authority* v. *Goldberg*, 298 F.2d 367 (5th Cir. 1962), the Authority was organized for the sole purpose of providing facilities for lease to Government instrumentalities. The building in question was not a general office building; it was leased totally and exclusively to United States Government agencies. Finding that the activities of the federal employees housed therein constituted the "production of goods for commerce," the court held that the maintenance employees of the building were within the Act's coverage. As in *Kirschbaum*, the court correctly found that the building itself was "devoted" to the production of goods for commerce.

In the present case, the Court below found that the respondents were covered by the Act because, for a two-year period, approximately 75% of the building had been leased to a tenant whom the Court found engaged in the production of goods for commerce. (R. 296-98; App. B 5-6). In finding coverage, the Court squarely rejected the rationale of *Callus*—namely, that the maintenance employees of an office building locally owned and held out for general tenancy are not covered by the Act.[10]

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[10] In *Callus* itself, this Court found irrelevant the proof that 48% of the tenants were engaged in the production of goods for commerce. Even assuming, *arguendo*, that the *Callus* decision permits a case-by-case determination of each tenant's operations in order to judge the Act's application to office building maintenance personnel, the "production" activities being carried on by the tenants in *Callus* were far more directly concerned with the actual "production of goods" than the activities being carried on by petitioner's tenants.

In *Callus* nearly half the rental area was occupied by sales agencies which procured contracts for performance in interstate commerce, publicity concerns which designed advertising material and printed matter and shipped it in interstate commerce, and executive offices of manufacturing concerns. See *Callus* v. *10 East 40th St. Bldg., Inc.*, 146 F. 2d 438, 441 (2d Cir. 1944). Notwithstanding these activities, this Court found that the maintenance employees concerned were not covered by the Act.

Under the *Callus* decision, whether or not these tenants' activities constitute the "production of goods for commerce" is an irrelevant question. The ultimate issue is whether the custodial employees are themselves engaged in such production, or in activities closely related and directly essential thereto. The court's misapplication of *Callus* creates unnecessary complexities that can be dealt with only by analysis in each case of the entire spectrum of tenants' activities.[11]

There is no need to wrangle over this question in the present case. The coverage of the Act should not depend upon elusive inquiry into the patterns of tenant activity. The ultimate issue is not whether the *telephone company* employees are covered, but whether the activities of the *custodial employees* are "closely related" and "directly essential" to the "production of goods." That question cannot be answered by constructing an endless series of causal relationships[12] or by "merely logical deduction."[13] Its answer must be found by focusing upon the purpose to which the building in question

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[11] Petitioner contested below, and would contest in this Court, the holding that the personnel employed at the telephone company executive offices were engaged in the production of goods for commerce. Their functions were rather those of office employees connected with commerce "only because of their supervision of physical production activities carried on elsewhere . . . ." *Ullo* v. *Smith*, 177 F. 2d 101, 105 (2d Cir. 1949). Some courts have spoken of "actual physical production on the premises," apparently equating this term with the manufacture of tangible products such as occurred in *Kirschbaum*. See *e.g.*, *Baldwin* v. *Emigrant Indus. Sav. Bank*, 150 F. 2d 524, 525 (2d Cir.), *cert. denied*, 326 U.S. 767 (1945). However, these diverse formulations of legal conclusions do not clarify the fundamental distinction drawn by this Court between *Kirschbaum* and *Callus*, approved by Congress, and reaffirmed in *Zachry*.

[12] "Indeed, were it otherwise, the Act would sweep into its maw every business, however local, which manufactured nothing whatever, merely because it was carried on by correspondence, which is the case with all business." *Bozant* v. *Bank of New York*, 156 F. 2d 787, 789 (2d Cir. 1946).

[13] *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. at 314.

is dedicated. As this Court held in *Callus*, the activities of maintenance employees of locally owned general office buildings are too remote from the production of goods to be within the Act's coverage, regardless of the activities of the tenants.

II. The Decision Below Is In Conflict With Decisions In Other Courts of Appeals.

The decision of the Court below is in direct conflict with decisions of the Courts of Appeals for the Fourth and Sixth Circuits.

In *Hunter* v. *Madison Avenue Corp.*, 174 F.2d 164 (6th Cir.), *cert. denied*, 338 U.S. 836 (1949), the maintenance employees of a locally owned office building brought suit, claiming that they were covered by the Act. They alleged that 84.8% of the average rented space in the building was occupied by tenants engaged, in one way or another, in the production of goods for commerce. The district court had dismissed the suit.

In affirming, the court of appeals relied exclusively on *Callus* (174 F.2d at 167) and refused to examine the employees' contention that the activities of the tenants were controlling (Id. at 166):

> "[I]t is unnecessary to determine what percentage of the tenants was engaged in the production of goods for interstate commerce or in an occupation necessary to the production of such goods."

There can be no doubt that the decision of the Fifth Circuit in the present case directly conflicts with the Sixth Circuit opinion in *Hunter*. The Sixth Circuit held that it did not need to examine the claim that almost 85% of the space in a locally owned office building was occupied by tenants who in some way produced goods for commerce, since the Act did not apply to maintenance employees of such a building. In the present case, the

court below held the maintenance employees covered because approximately 75% of the space was occupied by tenants who, the court found, produced goods for commerce.

Similarly, in *Thomason* v. *Alester G. Furman Co.*, 222 F.2d 421 (4th Cir.), *cert. denied*, 350 U.S. 865 (1955), the Court of Appeals for the Fourth Circuit found that maintenance employees of an office building owned by a local bank were not covered by the Act's provisions (*id.* at 422-23):

> "The office building here was an essentially local enterprise notwithstanding that a *number of persons or corporations having offices therein may have been engaged in commerce or in the production of goods for commerce.*" (Emphasis added.)

The Court in effect refused to enter into an examination of the occupations of the various tenants, relying wholly upon this Court's decision in *Callus*. Again, there can be no doubt that the present case is in direct conflict.[14]

CONCLUSION

The decision below requires review by this Court.[15] It is in conflict with this Court's decision in *Callus*, and is plainly wrong. Moreover, it is in conflict with the deci-

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[14] In a later case, the Court of Appeals for the Fourth Circuit succinctly expressed its interpretation of this Court's mandate in *Callus*:

> "We reach the above conclusion [that plaintiffs are not covered by the Act], as did the Court in Callus, without consideration of the quantitative evidence regarding the amount of customer activity which is or was in production for commerce or 'in commerce.'" *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451, 461 (4th Cir. 1963), *cert. denied*, 377 U.S. 925 (1964).

[15] The case presents a single limited issue for decision and, we respectfully suggest, might appropriately be placed on this Court's summary calendar.

sions of at least two courts of appeals which have correctly applied and followed *Callus*.

In addition, the decision below introduces a new element of uncertainty into an area reasonably well settled heretofore. Every office building owner who holds out his offices for general tenancy will be required constantly to review the activities of each of his tenants to determine: (1) which of them, if any, are engaged in activities which constitute the "production" of goods for commerce; (2) the percentage of rentable space occupied by such tenants; and (3) the amount of each such tenant's space in fact devoted to such "production" activities. Unless the decision below is corrected, no general office building owner will be able to determine with any certainty his obligations under the Act.

Accordingly, for the reasons stated, the petition should be granted.

Respectfully submitted,

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